

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 837 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE N.J.PANDYA and

Hon'ble MR.JUSTICE S.D.PANDIT

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1. Whether Reporters of Local Papers may be allowed  
to see the judgements? Yes

2. To be referred to the Reporter or not? No. te  
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3. Whether Their Lordships wish to see the fair copy  
of the judgement? No.

4. Whether this case involves a substantial question  
of law as to the interpretation of the Constitution  
of India, 1950 of any Order made thereunder? No.

5. Whether it is to be circulated to the Civil Judge?  
No

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JETHA PALA

Versus

STATE OF GUJARAT  
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Appearance:

MR AD SHAH for Petitioner

CORAM : MR.JUSTICE N.J.PANDYA and

MR.JUSTICE S.D.PANDIT

Date of decision: 07/05/97

ORAL JUDGEMENT(Per:Pandit.J)

Harijan Jetha Pala original accused no.12 in Sessions Case No. 8/89 on the file of the learned Addl. Sessions Judge, Jamnagar has preferred the present appeal against the order of conviction and sentence passed against him on 29.8.89 by which he has been held guilty for the offence punishable under section 302 IPC and is sentenced to suffer R.I. for life and to pay a fine of Rs. 500/- in default to suffer R.I. for two months.

2. The prosecution case is that on 6.5.88 at village Jamjodhpur in Harijan Vasti a quarrel had taken place on account of the issue of fetching water from the well amongst the lady members sometime in the evening and at about 8.30 p.m. on that day present appellant and 11 other original accused had formed an unlawful assembly with a common object of causing simple hurt, grievous hurt as well as death of deceased Harijan Kara Raja and Soma Raja and that in the prosecution of the said common object they had caused grievous hurt to them as well as they had caused their death and simple hurt to other prosecution witnesses. It is the case of the prosecution that in the said incident, present appellant had used a knife and he had given blows by knife on both the persons. Original accused nos 1 to 12 were charged with the offences punishable under sections 143,147,148,149,323 read with section 149, 324 read with sec. 149, 307 read with section 149 and 302 reads with section 149 of IPC and present appellant was individually charged for the offence under section 302 IPC. All the accused have pleaded not guilty to the charge and their defence is that of total denial and false implication.

3. In order to prove its case against the prosecution the prosecution had examined 11 witnesses including p.w. 2 Gordhan Rajabhai, p.w. 3 Mahesh Hirabhai, p.w. 4 Khimji Kanjibhai, p.w. 9 Rajubhai Palabhai. Besides the said evidence of eye witnesses, the prosecution had also relied upon the dying declaration recorded by p.w. 9 Vijay Barot and the dying declaration at exh.64. The learned Addl. Sessions Judge had considered the evidence led before him and had found that the prosecution had proved its case only against the

present appellant-original accused no.12 and he held him guilty for the offence punishable under section 302 IPC and sentenced him as stated earlier.

4. Being aggrieved by the said decision the original accused no.12 has come in appeal before this court. There is no dispute of the fact that in the said incident which took place on 6.5.88 at about 8.3.p.m. two deceased persons had sustained injuries. The learned advocate for the appellant Mr. A.D.Shah fairly conceded that he is not also disputing the fact that the appellant had caused incised wound on the person of two deceased persons in view of the material on record but what he contended was that from the material on record it would be quite clear that the incident in question had taken place in a melee. Both sides i.e. the side of the accused as well as the side of the original complainant injured persons had attacked each other after the original quarrel had started on account of the exchange abuses by the women flock which ultimately turned into a free fight between the two parties. He further contended before us that present appellant Jetha Pala was hardly 19 years old at the time of incident and that in a grave and sudden provocation the acts complained of have been committed by him. He thus contended that the appellant could be held guilty for the offence of culpable homicide not amounting to murder and he could not be held guilty of the offence of murder.

5. The prosecution has examined Dr. J.J.Pandya p.w.1 who was working as medical officer of Primary Health Centre, Jamjodhpur at the time of incident in question. If the evidence of this witness is considered then it would be quite clear that his evidence is also showing that on that day of 6.5.88 he had also examined present appellant and two more persons from the side of the accused who had received injuries on their person. Injuries found by him on their person could not be said to be either self inflicted or trivial. Therefore, that evidence of p.w. 1 supports the contention of the learned advocate for the accused that there was a free fight between the two groups and the persons of both the sides were injured. Here it is also necessary to make a reference to the dying declaration recorded by V.R.Barot which is at exh.65 page 533. This dying declaration is recorded by Barot on 7.5.88 of Dahyabhai Kalabhai Makwana who has sustained injury. If the said dying declaration is seen then it would be quite clear that said person is making a reference to the present appellant and other accused present at the time of incident with some weapons. But it is very pertinent to note that he does not say

as to how and why he has sustained injuries and at whose hands he suffered injuries. We make a reference to this aspect of the dying declaration in order to accept the contention raised by Mr. A.D.Shah that the incident in question was an incident of free fighting. Because had there not been a free fight and if it was a case of only the side of the accused attacking the prosecution side, then said declarant of the dying declaration would have given details as to how he sustained injuries and at whose hands he has sustained injuries.

6. It is also very necessary to mention here that none of the prosecution witnesses are giving any explanation as to how the present appellant and other accused person had sustained injuries. This fact shows that they are not ready to disclose the whole truth and the claim made by the learned advocate for the appellant that there was free fight between the two parties could not be rejected.

7. If the evidence of four prosecution witnesses is taken into consideration then it would be quite clear from the evidence that the incident had taken place on the issue of fetching water from the well and the disputes had taken place initially amongst the women flock. If the list of 12 accused who were charged by the learned Addl. Sessions Judge is taken into consideration then it would be quite clear that out of the 12 accused, 4 are ladies.

8. It must be mentioned here that it is not the case of any of the prosecution witnesses that by remaining present in the the area any of the accused had any motive to commit the offence in question. None of them is suggesting or showing that prior to the incident in question there was any dispute or quarrel between the present appellant and injured persons.

9. Therefore, if all the above circumstances are taken into consideration the the claim made by the learned advocate for the appellant that the incident in question had taken place all of a sudden and in that incident the appellant before us caused the injuries in question without any intention to cause death of the prosecution witness as well as the original deceased person will have to be accepted.

10. No doubt the present appellant has used a knife and he had inflicted injuries on two persons. As regards death of 2nd person viz. Harijan Kalabhai it must be stated that the prosecution has not taken proper care to

see that proper evidence is brought on record regarding the injuries sustained by him. The prosecution has examined only the doctor who has performed the post-mortem of his dead body on 13.5.88 and said doctor has stated on oath as well as in the P.M. notes that the probable cause of death is Cardiorespiratory failure of account of bilateral pneumonia and peritonitis following stab injury of abdomen. But it is not clear on record what was the nature of the injury when the patient was first examined by the medical officer. Unfortunately the learned defence counsel has not also cross examined the medical officer who has performed the post mortem examination. The learned Additional Sessions Judge also did not take care to see that proper material is placed on record as regards the nature of the injuries on the said person. the circumstances the evidence regarding injuries sustained by the said Harijan Kalabhai is not satisfactory.

11. But any way from the evidence on record we are of the view that the act committed by the appellant is committed by him in a grave and sudden provocation and the the appellant himself was also injured in the said incident. From the material on record we are unable to hold that the appellant had any intention to cause the death of either of the two deceased persons. Therefore, in the circumstances we hold him guilty of the offence punishable under section 304-Part-I IPC instead of offence punishable under section 302 IPC.

12. Looking to the young age of the appellant at the time of the incident and the fact that the incident in question has happened in a heat of passion, we hold that the sentence of R.I. for ten years and a fine of Rs. 500/ will meet the ends of justice.

13. Thus we hold that the appeal is partly allowed. The appellant is acquitted of the offence u/s 302 IPC. However he is held guilty of the offence punishable under section 304-Part I IPC and sentence him to suffer RI for ten years and a fine of Rs. 500/ in default to suffer R.I. for one month more.

(N.J.Pandya.J)

(S.D.Pandit.J)

